It is also likely that the statement of the appellant alone (i.e. not supported by Ex. D1) would have left the learned Magistrate in doubt as to whether the appellant knew that the watches therein mentioned were uncustomed.

I allow the appeal and discharge and acquit the appellant. The *Movado* watch is to be released and returned to the appellant and the fine paid is to be refunded.

*Appeal allowed.*

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## ABU BAKAR BIN ALIF v. R.

[A. Cr. J. (Spenser Wilkinson, J.) October 10, 1952]

[Penang — Criminal Appeal No. 31 of 1952]

*Criminal procedure — Appeal against sentence — Principles which should guide Appellate Court — Necessity of evidence of antecedents and character.*

Various grounds of appeal were raised in this appeal and the learned appeal Judge after dealing with each of them dismissed the appeal. One important point which arose out of the judgment was the learned Judge's directions as to the principles which should guide an Appellate Court in considering the sentence passed by the Court below. The accused in this case had been convicted under section 161 of the Penal Code for illegal gratification and sentenced to 4 months r.i. Following the principles laid down in R. v. Ball[1], the learned Judge held that he was unable to say whether the sentence was excessive or inadequate. No information was available on the record as to the accused's background antecedents or character. The principles stated in R. v. Ball[1] were: (1) the Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge had seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it; (2) the first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore, fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the Court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person.

*Case referred to:—*

(1) *R. v. Ball* 35 Cr. App. R. 164.

CRIMINAL APPEAL.

*E. A. de Buriatte* for the appellant.

*C. M. Sheridan* (D.P.P.) for the Crown.

*Cur. Adv. Vult.*

**Spenser Wilkinson, J.** [after dealing with other matters which are not relevant to this report, continued]: — The final ground of appeal is that the sentence is excessive. The learned Deputy Public Prosecutor on behalf of the Crown submitted that if the conviction were upheld he would suggest that this sentence was manifestly inadequate. The learned Magistrate has unfortunately given no reasons for imposing the sentence that he did and therefore before I can interfere I have to consider whether on the face of it this sentence is clearly wrong.

In the case of *Rex v. Ball*[1] the Court of Criminal Appeal restated the principles which should guide an Appellate Court in considering the sentence passed by the Court below. "In the first place", the judgment reads, "this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene". In my opinion these remarks apply with equal force to appeals to the High Court from the Subordinate Courts. I am unable to say in this case that the sentence was excessive or inadequate to such an extent as to satisfy me that there was a failure to apply the right principles.

There is an additional reason in this case why I should not interfere with the sentence. No information is available on the record as to the accused's background, antecedents or character. Whether in this instance the learned Magistrate omitted to call for such information or whether it was not available I do not know; but I have frequently remarked upon the absence of information of this kind which might assist the Courts in arriving at a proper assessment of sentence, and this case is a good example. The case of *Rex v. Ball*[1] abovementioned arose from different sentences having been imposed upon two prisoners convicted of the same crime at the same time. The principles of punishment set out in the judgment in that case are so important that I think it right to quote further from that judgment at some length. The judgment proceeds as follows:—

"In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced

to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

"It is for these reasons, and with these purposes in view, that before passing sentence the Court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in Court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career."

I desire to emphasise the importance of Magistrates calling for evidence or information regarding the background, antecedents and character before passing sentence on a convicted person and of the prosecution making available as much information thereon as possible. A Magistrate should not hesitate to adjourn the case, if necessary, so as to ensure that he is fully informed on these matters. The Police may in some cases have difficulty in obtaining information in regard to an accused person, but it seems tc me that this is a matter upon which Probation Officers could be of assistance in the same way as they are in England.

As far as the case now before me is concerned my only information is that the appellant is a first offender of good character and has been in Government Service for eighteen years. Although, therefore, the sentence appears to me to be somewhat lenient in respect of an offence of corruption by a Government servant I am unable to say that it is wrong.

*Appeal dismissed.*

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## PUBLIC PROSECUTOR v. TAY TUAN.

[A. Cr. J. (Abbott, J.) December 3, 1952]

[Malacca — Criminal Appeal No. 21 of 1952]

*Criminal Procedure Code (Cap. 21), ss. 182 and 427 — Procedure — When does a criminal trial commence?*

Section 427 of the Criminal Procedure Code requires that a Chemist's Report intended to be used as evidence at a trial must be served not less than 10 clear days before the commencement of the trial. When this case was first mentioned no report has been served, but the report was subsequently served 10 clear days before the hearing.

**Held:** by section 182 of the Criminal Procedure Code, the accused when charged may either plead guilty or claim to be tried. His trial therefore does not commence until his claim has commenced to be met, i.e., on the day of the hearing.

CRIMINAL APPEAL.

*D. C. Jackson* (D.P.P) for the Public Prosecutor.

Respondent in person.

*Cur. Adv. Vult.*

**Abbott, J.** : — The respondent was charged before the Sessions Court with having been in the possession of opium. He was acquitted in the following circumstances. The prosecution sought to rely upon the certificate of the Government Chemist relating to the substance which was found in the possession of the respondent. The learned President held that the certificate was inadmissible in evidence because it had not been served upon the respondent "not less than ten clear days before the commencement of the trial", as required by section 427 of the Criminal Procedue Code (Cap. 21) of the laws of the Straits Settlements. The respondent was brought before the Sessions Court on 26th September last when his plea was taken; he "claimed trial" and the case was adjourned for the hearing of the evidence to the 20th of October. The certificate was served upon the respondent on the 6th of October, fourteen clear days before the hearing. The learned President held that the trial had commenced on the 26th of September and, from that, that the certificate had been served upon the respondent after the commencement of the trial. In the view of this Court the learned President was in error for the following reasons. The procedure of recording a plea in this country varies from the procedure followed in England. In England an accused person is called upon to plead and he is required to say whether he is guilty or whether he is not guilty — it could be argued that in England a trial commences when the accused is charged and before his plea is taken. By the laws of the Straits Settlements, section 182 of the Criminal Procedure Code, the accused has to be charged and he may either plead guilty or "Claim to be tried". It appears therefore that until the accused has claimed to be tried and his claim has commenced to be met, he has not begun to be on trial. In this case the accused claimed trial on the 26th of September and his trial commenced on the 20th of October, more than ten clear days after he had been served with the certificate. It might be that this is a proper case for ordering a fresh trial, but I am not prepared to do so since the learned Deputy Public Prosecutor has asked me for no more than a declaratory judgment upon the law. In these circumstances I feel justified in not making any order.

*No order made.*